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No. 01-1817

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN,
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OPPOSING MOTION TO AFFIRM

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INTRODUCTION

Pursuant to Supreme Court Rule 18.8, Appellants Jubelirer and Ryan ("Presiding Officers") file this Brief in Opposition to the Motion to Affirm submitted by Richard Vieth, et. al (Appellees herein and Plaintiffs below). The Motion to Affirm only reinforces the need for this Court to clarify the legal basis and standards for assessing one-person, one-vote claims such as the one involved here.

ARGUMENT

I. The *Karcher* Test

In response to Presiding Officers' request that the Court reconsider its refusal to recognize a *de minimis* standard for population deviation in *Karcher v. Daggett*, 462 U.S. 725 (1983), Appellees posit that "[t]here is no reason to revisit the long-standing, unambiguous" test set forth in *Karcher*. Motion to Affirm at 9. Appellees urge that "[t]echnological advancements since *Karcher* have made it increasingly simple to draw districting maps with absolute precision ...," *id.* at 10, and state that "[a]s the trial evidence in this case confirms, zero population deviation is an even simpler task in today's redistricting world." *Id.* at 11.[1]

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[1] Appellees imply that Pennsylvania's congressional redistricting plan is an anomaly for containing a population deviation greater than 1. *See* Motion to Affirm at 1-2. However, the chart cited by Appellees shows that a number of state legislatures have enacted congressional plans with maximum population deviations greater than that of Act 1, including: Arkansas – 303; Georgia – 72; Idaho – 3,595; Indiana – 102; Iowa – 134; Kansas – 33; Louisiana – 240; New Hampshire – 636; New Mexico – 166; and Virginia – 38. *See* www.ncsl.org/programs/legman/Redistrict/RedistPopDev.htm. Since 7 states do not have to redistrict because they have only one representative, these 10 states equate to approximately 25% of the 43 states that have, or will be redistricted, with

Appellees, as did the three-judge court below, strip the *Karcher* test of all meaning by advocating that a plaintiff need only proffer a *tabula rasa* map with a population deviation of absolute zero to invalidate a duly-enacted plan. If this is truly the standard, then *Karcher*'s requirement of a good-faith effort and legitimate justification for any deviations – which, as part of the test, exhibited respect for the fact that redistricting is a legislative and political process – are meaningless. Revisiting the *Karcher* standard is critical in order to assure that the components of the test have substance and that the constitutionally-mandated role of the state legislatures is recognized.

Should it undertake to review the *Karcher* test, the Court will be faced with three choices.

First, the Court could uphold the *Karcher* test as applied by the three-judge court to require absolute zero under any and all circumstances and essentially strip the test of all substance. This is the true ramification of

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redistricting plans with a maximum population deviation greater than the Act 1 plan. The Act 1 plan is far from an anomaly.

Two other three-judge federal courts have considered the propriety of a deviation from zero in a congressional redistricting plan based on the 2000 Census. A three-judge court upheld the 33-person deviation in the Kansas congressional redistricting plan in *Graham v. Thornburgh*, No. 02-4087-JAR (D. Kan., issued July 3, 2002) (available online at http://www.ksd.uscourts.gov/redistrict/documents/42.pdf). A three-judge court in Mississippi drew and put in place a congressional redistricting plan with a 10 person deviation, justified on the basis of avoiding precinct splits. *See Smith v. Clark*, 189 F. Supp.2d 529, 539 n.5 (S.D. Miss. 2002) ("In order to achieve absolute perfection, we would have to split precincts [and] [w]e find ... that splitting precincts would cause administrative problems for election officials and confusion and frustration for voters.").

allowing a plaintiff to rely on maps never placed before the General Assembly to meet its *Karcher* burden or that do not respect the legislative policies embodied in the duly-enacted congressional redistricting plan.

Second, the Court could re-ascribe meaning to the first prong of *Karcher* by looking to the redistricting proposals that were before the state legislature when it passed the challenged plan – not at abstract plans concocted for litigation – as evidence of the legislature's good faith. This was the approach taken in *Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Law*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992).

Third, the Court could shift the basis of analysis of one-person, one-vote claims from U.S. CONST. art. I to U.S. CONST. amend. XIV. Among all the States, the population deviation between the largest and smallest congressional district (the single districts of Wyoming and Montana) is currently 63%.[2] This disparity makes the standard based on U.S. CONST. art. I (established in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and elaborated on in *Karcher*) suspect. *See Wesberry*, 376 U.S. at 28-29

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[2] Montana has the largest congressional district (population 902,195), while Wyoming has the smallest congressional district (population 493,782). If the total population of the United States is considered, the ideal population for a congressional district would be 645,631 or 645,632. Montana is 256,563 individuals over the "ideal" and Wyoming is 151,850 individuals under the "ideal," making the maximum total population deviation 408,413 (63%). The population and apportionment data used to derive the maximum total population deviation can be found in the following tables available on the U.S. Census Bureau's website (http://www.census.gov/main/www/cen2000.html): (1) Resident Population of the 50 States and (2) Apportionment Population and Number of Representatives by States: Census 2000.

(Harlan, J., dissenting); *see also id.* at 18-19 (Clark, J., concurring in part and dissenting in part); *see also Karcher*, 462 U.S. at 744-750 (Stevens, J., concurring) (explaining that the holding in *Wesberry* has firmer roots in the Equal Protection Clause than in art. I).

The Fourteenth Amendment provides the standard used for legislative redistricting plans. *See Reynolds v. Sims*, 377 U.S. 533 (1964). It permits legislatures to draw legislative redistricting plans that contain a larger population deviation than congressional plans, even though the populations of those districts are much smaller. It seems incongruous to have a different one-person, one-vote standard for legislative and congressional plans. *See Karcher*, 462 U.S. at 765-83 (White, J., dissenting); *see also* Comment, *Reapportionment: A Call for a Consistent Quantitative Standard*, 70 IOWA L. REV. 663 (1985). The equal protection analysis can accommodate the 63% deviation between the Wyoming and Montana districts; the Article I analysis can not.

To uphold a population deviation under the Fourteenth Amendment, all that is needed is a legitimate state purpose. The population difference between the Montana and Wyoming districts occurs because of such a purpose. U.S. CONST. art. I, §2 requires that "each State shall have at least one representative" and U.S. CONST. amend. XIV, §2 requires that "[r]epresentatives shall be apportioned among the several States according to their respective numbers." When the apportionment process was done, Montana did not have a sufficient number to be apportioned two representatives and Wyoming, even though it did not have enough population for even one district, was constitutionally entitled to at least one. The constitutional requirements provide the legitimate state purpose that explains the large disparity between the populations of the single districts of Montana and Wyoming. But, the "as nearly as practicable" standard of

Article I, which under *Karcher* permits no *de minimis* disparity, cannot be met because there are other methods that Congress could use to apportion representatives that would result in less population disparity among districts (e.g., the number of representatives could be increased).

II. Justification Under Prong Two of the *Karcher* Test

In their Motion to Affirm, Appellees contend that Defendants offered the three-judge court only one justification for the 19-person deviation – a desire to reduce precinct splits – and that Presiding Officers are now attempting to meet their burden under *Karcher*'s second prong by simply reciting other legitimate justifications. *See* Motion to Affirm at 15, 18. This is an erroneous characterization of the record.

At trial, Presiding Officers offered, and the three-judge court admitted, legislative journals of the Pennsylvania House and Senate which revealed that the General Assembly was concerned with creating a safe seat for the "Dean" of the Pennsylvania congressional delegation, Democrat Congressman Murtha, *see Anne Arundel County*, 781 F. Supp. at 409 (accepting as a legitimate justification the need to draw a safe seat for Rep. Hoyer, "the fourth ranked Democratic member of the United States Congress"), and preserving the two minority-majority districts in the Philadelphia area. *See id.* at 387. These justifications were also developed in Presiding Officers' post-trial brief. Accordingly, additional justifications were before the three-judge court, which erroneously characterized them as irrelevant. *See* J.S. of Appellants Jubelirer and Ryan at 20-21.

III. Partisan Gerrymandering

In their Motion to Affirm, Appellees repeatedly seek to strengthen the finding that Act 1 was

unconstitutional by characterizing the plan as a partisan gerrymander. *See* Motion to Affirm at 7, 16, 17. They insinuate that the 19-person deviation was a byproduct of the General Assembly's desire to solidify a Republican partisan advantage, *see id.* at 7, going so far as to label the individuals in charge of the Act 1 map-drawing process "political operatives." *Id.* at 5.[3]

The fact remains, however, that Appellees' claim for unlawful partisan gerrymandering was dismissed by the three-judge court for failure to state a claim under *Davis v. Bandemer*, 478 U.S. 109 (1986). In other words, the three-judge court concluded that Appellees had failed to allege facts that, even if true, would show an unconstitutional partisan gerrymander. There is no gray area here. If the partisan aspects of a plan are not unconstitutional, then they must be constitutional. And if constitutional, they cannot provide a basis to consider a legitimate justification – avoiding additional precinct splits – unconstitutional. Beyond that, it simply strains credulity to suggest that the miniscule deviation in Act 1 was tolerated for the very reason that it ensured the success of the alleged gerrymander.

In the final analysis, the one-person, one-vote claim was included in this litigation to pursue partisan political goals that could not be achieved in the legislative process nor through a claim subject to the stringent *Bandemer* analysis. The nominal plaintiffs were stalking horses for political figures opposed to Act 1 but unable to rally support for their views in the appropriate arena. Despite the earlier decision to dismiss the partisan gerrymandering

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[3] It should be noted that Appellees refer to Dr. Memmi's testimony to support this proposition. *See* Motion to Affirm at 4-5. However, the pages of testimony appended to the Motion to Affirm that they reference (pp. 9a, 11a and 12a) do not seem to support Appellees' statement.

claim, much of the trial consisted of testimony about politics, admitted over Presiding Officers' objection as to relevancy, *see* pages of testimony appended to Motion to Affirm at 4a, and ultimately ignored by the three-judge court in its ruling. It is particularly revealing that Appellees' mapping expert was an employee of the Democrat Caucus of the Pennsylvania House of Representatives and that his computer generated maps were never offered in the General Assembly[4] but hoarded for litigation.

The fear enunciated by Justice O'Connor in her *Bandemer* concurrence – that "the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court" – has been extended beyond the partisan gerrymandering context. *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment only). This Court should not countenance a legal approach to one-person, one-vote claims that allows disappointed political factions to attack a redistricting plan for what are partisan reasons appropriate for legislative consideration but not judicial consideration and thereby "open[] the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment." *Id.*

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[4] Perhaps because 42 members of the House Democrat Caucus voted in favor of the bill which became Act 1.

CONCLUSION

For the foregoing reasons, in addition to those set forth in Appellants Jubelirer and Ryan's Jurisdictional Statement, this Court should note probable jurisdiction of the appeal and proceed to address the merits of the questions presented.

Respectfully submitted,

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